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No. 73-793

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN OLIVER CHALKER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner claims that his conviction for failure to report for induction should be reversed because his local Selective Service board refused to consider his post-induction-notice conscientious objector claim, and because the board failed to state its reasons for denying his requests for occupational and hardship deferments.

After the district court entered an opinion denying his pretrial motions (337 F. Supp. 928; Pet. App. 8), petitioner was convicted in a jury-waived trial in the United States District Court for the Middle District of Florida on one count of failing to report for induction into the armed forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to imprisonment for eighteen months, all but ten days of which was suspended, and to a two year period of supervised probation. The court of appeals affirmed without opinion (Pet. App. 7).

The facts, which are uncontested, are summarized in the opinion of the district court (Pet. App. 8-17). In relevant part, they indicate that after registration with his local draft board, petitioner held various deferments through 1967. Shortly before petitioner's student deferment expired on his twenty-fourth birthday, he asked for a II-A or II-C deferment based on his employment as a spray pilot (C.A. App. 55-58),[1] but was classified I-A on January 8, 1968, when he became 24 (C.A. App. 62).

The board then received a letter from his employer supporting his request for occupational deferment, following which it reclassified him I-A and granted him a hearing, after which he was again classified I-A (C.A. App. 62). He was informed of this classification on March 14, 1968; on March 28, 1968, he requested a hardship deferment based on a statement that his father was ill, in which he indicated that he was leaving his job and returning home "to help when and where I'm needed" (C.A. App. 67). He was again reclassified I-A; on April 10 he wrote the board indicating that he had decided to remain at his job and asking that his case be sent to the appeal board (C.A. App. 70). His employer again requested an occupational deferment for him, but he was again classified I-A. The file was then transmitted to the appeal board, which, on August 28, 1968, unanimously reclassified him I-A (C.A. App. 72). No statements of reasons for the classifications were given either by the local board or the appeal board. On September 25, 1968, petitioner was ordered to report

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[1] "Tr." designates the transcript of the trial in the District Court; "C.A. App." refers to the Appendix filed in the court of appeals. Copies of both documents are being lodged with the Clerk of this Court.

for a pre-induction physical. Thereupon, on October 1, 1968, petitioner once again requested a hardship deferment, based this time on the fact that he had married a widow with two children. Material in his file, however, indicated that his wife would receive $295 monthly in insurance payments until December 1969; furthermore, her two children received $230 monthly in social security payments. On December 2, 1968, petitioner's request for a hardship deferment was reviewed and the local board found that the information received did not warrant a re-opening of petitioner's classification.[2]

On December 27, 1968, petitioner was ordered to report for induction on January 27, 1969 (Tr. 17). He did not appear, but he did file a request for transfer of induction to his current residence on January 27. The request for transfer was granted, and he was again ordered to report for induction on March 18, 1969. When petitioner did not report on that date, he was reported to the United States Attorney as a selective service violator. The United States Attorney declined prosecution at that time and requested that additional efforts be made through the Selective Service System to secure compliance by petitioner with his obligations (Tr. 17-18). On October 31, 1969, petitioner was ordered to report for induction on November 10, 1969 (Tr. 18).

On November 7, 1969, for the first time, petitioner submitted a request for classification as a conscientious objector (C.A. App. 17-18, Tr. 18-19). On December 9, 1969, petitioner submitted Form 150, a special form for conscientious objectors (C.A. App. 10-26), together with

[2] Although this was the hardship claim urged most strenuously below (Pet. App. 11-12, 20), petitioner does not here challenge this action.

a number of letters from various people indicating that petitioner had been known to hold pacifist views for at least three or four years previously (C.A. App. 27-32).[3] On March 30, 1970, petitioner was notified by letter from his local board that his claim for conscientious objector status had been denied. The board said that "the information submitted did not warrant reopening your classification and the board felt you were insincere in your claim" (C.A. App. 14-15). Petitioner was indicted for his refusal on November 10, 1969, to submit to induction.

Petitioner contends that his induction order was invalid because the local and appeal boards failed to give him a statement of their reasons for denying his claims for occupational and hardship deferments. He also contends that the local board improperly denied his post-induction-notice conscientious objection claim without reopening.

1. We believe that the board properly refused to reopen his classification to consider his conscientious objection claim, which the record indicated had crystallized before the receipt of his induction notice. Since 32 C.F.R. (1969 ed.) 1625.2 precludes re-opening after the mailing of an induction notice, unless the board finds there has been a change in the registrant's status resulting from circumstances over which registrant has no control, the board could not, on the facts of this case, properly have re-opened when petitioner submitted his Form 150.

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[3] These statements conflicted with a letter petitioner had written to his local board on December 25, 1967, in which he stated that he had "tried to fly for the military" but could not meet their physical standards due to his poor eyesight (C.A. App. 55-58).

The board's action was proper even if it be assumed, contrary to the letters in support of his claim, that petitioner's objection crystallized after receipt of his induction notice, since, in that case, petitioner would be limited to his post-induction remedies. See *Ehlert* v. *United States*, 402 U.S. 99, 104. Any possible ambiguity in the board's action tending to indicate that it considered petitioner's claim on the merits would not affect petitioner's rights. The board simply had no power to consider his post-induction order conscientious objection claim. See *Musser* v. *United States*, 414 U.S. 31.

2. Petitioner also contends that the failure of the boards to provide statements of reasons for denying his claims for an occupational deferment and his first hardship claim rendered his induction order invalid. But petitioner in effect abandoned his first hardship claim in his letter of April 10, 1968, in which he stated that he had decided to remain at his job, rather than returning home to take care of his father. Petitioner by this action demonstrated that the board had correctly concluded that petitioner's hardship claim was invalid, since his father's condition did not require his presence. Under these circumstances, it would be particularly inappropriate to hold that the board's failure to enunciate the reasons for its correct conclusion forever excused petitioner from all further obligations to submit to induction. Cf. brief for the United States in *Davis* v. *United States*, No 72-1454, pp 22-24.[4]

Petitioner urged his claim for an occupational deferment more seriously; it was considered and rejected by the local board three times, and unanimously rejected by the appeal board. These bodies thus concluded that petitioner

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[4] A copy of this brief is being sent to petitioner's counsel.

would better serve the national interest in the armed forces than in his civilian occupation. This decision, turning as it does on an evaluation of national needs, is significantly different from decisions concerning conscientious objection, or even hardship, which turn on the personal needs of the registrant. Therefore, we submit, when the board acts within its discretion in denying a claim for an occupational deferment, the registrant is not justified in refusing induction, since no personal rights of his have been violated.

The courts below concluded that the rule that a local board must state reasons for its classification decision when a *prima facie* case for a conscientious objector exemption has been presented, and that its failure to do so will vitiate a subsequent induction order, should not be extended to hardship and occupational deferment claims. The district court contrasted the "inherently subjective nature of conscientious objection" with the "generally objective" nature of occupational or hardship claims. It therefore concluded that, in the latter categories of cases, "courts can readily ascertain the reason for the denial of such a claim (if such reason exists) by an inquiry into the file of the registrant," so the board need not state its reasons (Pet. App. 10-11). The court of appeals affirmed without opinion (Pet. App. 7).

This conclusion is inconsistent with the view of the Third Circuit, which has extended the requirement for a statement of reasons to hardship and occupational deferment claims. See *United States ex rel Bent* v. *Laird*, 453 F.2d 625 (C.A. 3) (hardship deferment) and *Cale* v. *Volatile*, 465 F.2d 1110 (C.A. 3) (occupational deferment). See also *United States* v. *Strandquist*, 345 F. Supp. 217 (D. Minn.) (occupational deferment); *United States* v. *Auger*, 337 F. Supp. 342 (N.D. Calif.) (hardship deferment).

As noted above, we do not believe that it is necessary in this case to consider whether the statement of reasons requirement should extend beyond conscientious objection claims. However, if that issue is reached, we submit that the conclusion of the district court is correct, for the reasons stated therein. This issue does not in any event merit plenary review by this Court, since the Military Selective Service Act was amended in 1971 to require a statement of reasons at the registrant's request for an adverse decision on any of his claims. 50 U.S.C. App. (Supp. II) 471a(b)(4). Any inconsistency between the decisions of the Third Circuit and the decisions below therefore affects only a limited number of pre-1971 cases.

The petition for a writ of certiorari should therefore be denied. Alternatively, if this Court believes it necessary to decide, in the context of this case, whether local boards must state reasons for their denial of *prima facie* valid hardship and occupational deferment claims, the petition for a writ of certiorari should be granted and the decision summarily affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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